

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA**

IN RE:

GRIFFIN SERVICES, INC.
DEBTOR

Case No. B-01-52373C-7W

JOHN GRIFFIN,

Plaintiff,

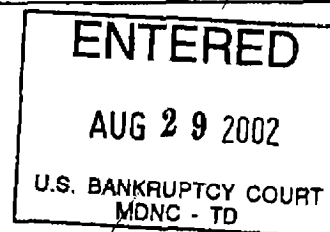
v.

ROLAN, INC.,

Defendant,

SHANNON GRIFFIN, KEVIN GRIFFIN,
U.S. STAFFING, INC., and
CREATIVE FREELANCERS, INC.,

Third Party Defendants



ADVERSARY NO.
A-02-06026W ✓

MEMORANDUM OPINION

This adversary proceeding came on before the court for consideration of the motion by the Defendant to dismiss this adversary proceeding and motion for abstention. The Court, having considered the motions, the response and the briefs filed in support of and in opposition of the motions and after review of the file, finds and concludes as follows:

On October 4, 2001, an involuntary Chapter 7 petition for relief was filed against Griffin Services, Inc. ("Griffin Services" or "Debtor") in the Bankruptcy Court for the Middle District of North Carolina. Griffin Services operated a temporary employment service that was

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headquartered in Winston-Salem, North Carolina and had places of business in Albermarle, Roanoke Rapids, Asheboro, Salisbury, Concord, Henderson, Creedmoor, Wake Forest, Fuquay-Varina, Winston-Salem, Greensboro, Charlotte, High Point, Wilkesboro, and Kernersville, North Carolina.

On October 17, 2001, Griffin Services filed a motion for a hearing to sell certain assets to Rolan, Inc. ("Rolan"). The matter came before the court on October 31, 2001 and the court heard testimony from Dredrich Von Soosten, a work out specialist that Griffin Services had employed prior to the involuntary bankruptcy filing. During the summer of 2001, Griffin, principally through the efforts of Von Soosten, attempted to secure a purchaser for its assets.

Subsequent to the filing of the involuntary petition, Griffin Services continued in operation of its business pursuant to the provisions of §303 of the Bankruptcy Code. On October 9, 2001, an Order was entered authorizing and approving an extension of post petition credit to the Debtor by Lighthouse Financial Corp. ("Lighthouse"), an entity that held a valid lien on the assets of Griffin Services. The post petition loan was extended by Lighthouse to Griffin Services to enable the company to attempt to realize a going concern value for its business through the sale of its operating assets. The Debtor signed a letter of intent to sell its assets to Rolan on October 31, 2001.

Debtor and Rolan entered into an Asset Purchase Agreement (the "APA") which provided for the sale of substantially all of the Debtor's assets and included exhibits consisting of a consulting agreement with John Griffin, a consulting agreement with Shannon Griffin, and a non-competition, non solicitation and confidentiality agreement executed by both John and Shannon Griffin. Similar agreements were reached between Rolan and related parties including John Griffin and his two sons, Shannon and Kevin Griffin, and their respective businesses.

As consideration for the sale of Assets, Rolan agreed to pay Griffin Services for a period of 18 months, in amounts determined as follows:

10% of weekly Gross Margin Dollars if gross weekly billings are less than or equal to \$300,000;

20% of weekly Gross Margin Dollars if gross weekly billings are greater than \$300,000 and less than or equal to \$400,000;

25% of weekly Gross Margin Dollars if gross weekly billings exceed \$400,000.

A hearing on the sale of assets was held on October, 31, 2001. Based upon the testimony presented, the worst case scenario would result in Griffin Services receiving \$476,190 with an expected return of \$1,058,580. The liquidation value of the tangible assets to be sold would probably not exceed \$26,000. The effective date of the transaction was November 5, 2001.

Griffin Services, having consented to the Involuntary Petition, converted the case pursuant to §706 of the Bankruptcy Code to a case under Chapter 11 on October 31, 2001.

On November 3, 2001, the court entered an order authorizing the sale of operating assets of the Debtor to Rolan under the APA and authorizing the continued funding of the Debtor by Lighthouse pending consummation of sale. The court found that the terms of the proposed sale were fair and reasonable and represented the best and only opportunity available to the estate and its creditors for realizing an economic benefit for the sale of the assets. The sale to Rolan was consummated on November 5, 2001. On December 6, 2001, the case was converted from Chapter 11 to Chapter 7 and Bruce Magers was appointed Trustee.

On November 28, 2001, Rolan filed an adversary proceeding against Plaintiff, his sons and their respective businesses. The adversary proceeding had claims for breach of contract, unfair and deceptive trade practices, misappropriation of trade secrets, and conversion, and alleged that Griffin, alone or in conjunction with his sons, materially breached the consulting agreement and the non-competition, non-solicitation and confidentiality agreement. On February

6, 2002, Rolan dismissed the adversary proceeding without prejudice.

On March 21, 2002, John Griffin filed this adversary proceeding against Rolan in the bankruptcy court seeking damages for breach of two contracts and for unfair and deceptive trade practices under N.C.G.S. § 75-1.1. On April 25, 2002, Rolan filed an Answer and Counter-Claims and a Third Party Complaint against the Plaintiff's sons and their respective businesses. On April 24, 2002, Rolan filed a state court action in Mecklenburg County, North Carolina based upon the same claims raised in its Answer and Third Party Complaint in the bankruptcy court. Rolan filed a motion to dismiss for lack of jurisdiction and a motion to abstain.

NO LACK OF JURISDICTION

Even though Rolan filed an earlier adversary proceeding in this court and filed its Answer to this Adversary Proceeding admitting that "related to" jurisdiction exists,¹ Rolan has filed a motion to dismiss the complaint on the grounds that the court does not have jurisdiction.

Pursuant to 28 U.S.C. § 1334(b), district courts have original jurisdiction of all civil proceedings arising under Title 11 or arising in or related to cases under Title 11. District courts have authority to refer such cases to the bankruptcy courts pursuant to 28 U.S.C. § 157.

The Fourth Circuit joins the First, Third, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits and follows the test set forth in Pacor, Inc. v. Higgins, 743 F.2d. 984 (3d Cir. 1984), overruled on other grounds by Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995), as to how to interpret "related to" jurisdiction. The Pacor test was stated by the Third Circuit as follows:

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could

¹In paragraph 5 of its Answer, Rolan stated "it is admitted that this proceeding is a non-core, related-to proceeding, although the relation is tenuous at best. Rolan does not consent to entry of final orders of judgment by the bankruptcy judge."

conceivably have any effect on the estate being administered in bankruptcy. Thus, the proceeding need not necessarily be against the debtor or against the Debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Pacor, 743 F.2d at 994. Courts have interpreted "related to" jurisdiction in a broad fashion holding "[e]ven a proceeding which portends a mere contingent or tangential effect on a debtor's estate meets the broad jurisdictional test articulated in Pacor." Blanton v. IMN Fin. Corp., 260 B.R. 257, 262 (Bankr. M.D.N.C. 2001) (quoting In re Titan Energy, Inc., 837 F.2d 325, 330 (8th Cir. 1988)). See also In re Rainbow Sec. Inc., 173 B.R. 508, 511 (Bankr. M.D.N.C. 1994) (Judge Stocks finding subject matter jurisdiction because "the court is not willing to say that the outcome of the third-party claim. . . could not conceivably have any effect upon the administration of the estate.").

The claims alleged in the adversary proceeding relate to the Debtor's underlying bankruptcy case. One of the causes of action is breach of contract based upon the Defendant's alleged failure to pay all sums due or properly account for monies due under the APA. The receipt of these monies clearly impacts the bankruptcy estate. Rolan was required to make payments over a period of 18 months based upon a variable percentage (10%, 20% or 25%) of gross margin dollars depending on the level of gross weekly billings. Testimony at the hearing to approve the APA indicated that the money received by the Debtor under the APA could range from a low of \$476,190 to a high of \$1,225,440, with a likely recovery of \$1,058,580. As of March, 2002, Rolan has made three monthly payments with an average payment of \$15,662.15. If that same rate continues, the estate will only receive \$278,398.70.

The other matters raised in the adversary proceeding center on the alleged breaches of a consulting agreement and also a non-competition, non-solicitation and confidentiality agreement

between the parties and possible unfair and deceptive trade practices related thereto. In its Answer, Rolan admits (paragraph 5) that this is a non-core matter and the court has "related to" jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334, and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. The court finds that adversary proceeding is "related to" the underlying bankruptcy case.

BASED ON THE FORGOING, Defendants motion to dismiss for lack of subject matter jurisdiction is DENIED.

MANDATORY ABSTENTION IS REQUIRED UNDER 28 U.S.C. § 1334(c)(2)

Under the requirements of 28 U.S.C. § 1334(c)(2), this Court must abstain from hearing the adversary proceeding filed by John Griffin. Section 1334(c)(2) provides:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11 with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

It is clear that the district court (and bankruptcy courts) are to abstain from hearing a proceeding when the moving party demonstrates that (1) its motion for abstention was timely; (2) the proceeding is based on state law issues; (3) the proceeding is "related to" a title 11 case but is not a core proceeding; (4) the proceeding otherwise could not have been commenced in the United States courts but for 28 U.S.C. § 1334; (5) there must be an action commenced in state court; and (6) the state action must be one which can be timely adjudicated in a state forum of appropriate jurisdiction. In re Pluma, Inc., 2000 WL 33673752 (Bankr. M.D.N.C. Sept. 15,

2000). See also In re Georgou, 157 B.R. 847 (Bankr. N.D. Ill. 1993); In re Leco Enterprises, Inc., 144 B.R. 244 (Bankr. S.D.N.Y. 1992).

The Plaintiff, in its brief, essentially concedes the first five requirements of §1334(c)(2). First, Rolan has filed a timely Motion for Abstention. Rolan filed the motion for abstention, along with the accompanying motion to dismiss for lack of subject matter jurisdiction, on April 25, 2002, thirty days after the issuance of the summons.

Secondly, the proceeding is based entirely on issues of state law. The claims are for breach of contract under North Carolina common law and claims for unfair and deceptive trade practices pursuant to N.C.G.S. § 75-1 *et. seq.* The counterclaims and third party claims are for unfair trade practices under N.C.G.S. § 75-1, breach of contract, misappropriation of trade secrets under N.C.G.S. § 66-152 *et seq.*, conversion, tortuous interference with prospective economic advantage, and injunctive relief. All of the claims asserted by the parties exist under North Carolina common or statutory law and no federal claims or bankruptcy causes of action have been alleged.

Thirdly, this action is a “related to” proceeding. This is a non-core proceeding which the Court is authorized to hear pursuant to 28 U.S.C. § 157(c). There is no dispute that the direct claims between the Plaintiff and Rolan are “related to” for purposes of § 1334(c)(2). As to the counterclaim and the third party claim, these claims could have a tangential effect on the estate and therefore are “related to” proceedings.

Fourthly, this proceeding could not have been commenced in the federal courts but for 28 U.S.C. § 1334. The claims do not raise a federal question and there is no diversity jurisdiction.

Lastly, a parallel action has been commenced in state court. On April 24, 2002, Rolan

filed a lawsuit against the Plaintiff and the Third Party Defendants in the General Court of Justice, Superior Court Division of Mecklenburg County, North Carolina. The Defendants answered and filed counterclaims against Rolan. The actions are identical except for the court in which they were filed.

The Plaintiff contends that mandatory abstention is inappropriate in this case because the sixth element necessary is not present in that there has not been a case commenced in state court that is capable of timely adjudication. The Defendant filed the state court proceeding in April, 2002, one day prior to filing a motion for abstention. The burden is on the party moving for mandatory abstention to prove that a parallel state court action is capable of timely adjudication in a forum of appropriate jurisdiction. See In re Burgess, 51 B.R. 300, 302 (Bankr. S.D. Ohio 1985) (denying motion for mandatory abstention because movant's "naked assertion that the matter can be timely adjudicated in the state court" is insufficient to meet its burden on showing mandatory abstention should be granted).

The issue for the court is whether this proceeding can be timely adjudicated in the General Court of Justice of Mecklenburg County, North Carolina. As pointed out by Judge Stocks in Pluma, "timely adjudicated is not defined in 28 U.S.C. § 1334 nor in the Bankruptcy Code." Pluma, at *2. In considering whether the matter can be timely adjudicated, the court should consider the time period it takes to move cases through state and federal court calendars, the status of the proceeding in the bankruptcy court, the complexity of the issues to be resolved, whether the parties consent to the bankruptcy court entering judgment in the non-core case and whether a jury demand has been made. Id. at *3.

The court should also examine how the trial in state court could impact the bankruptcy case. Like Pluma, this is a case in which the majority of the assets have been sold and the case is

being administered by a Chapter 7 trustee. There is no business to reorganize and the delay would not impact bankruptcy reorganization proceedings. In Pluma, the court stated,

There is nothing about the underlying Pluma bankruptcy case which leads to the conclusion that the adjudication of this case in state court should not be regarded as a "timely adjudication" for purposes of 28 U.S.C. § 1334(c)(2), given that the same amount of time likely would be required for the trial if the case were not remanded. A critical factor here is that the Pluma bankruptcy case involves a liquidation in which the primary concern is an orderly liquidation of assets and distribution of proceeds to creditors. Delay occasioned by related litigation therefore carries much less weight in the Pluma case than in a case involving a reorganization in which such delay might thwart the entire reorganization effort.

Id. at *4 (citing World Solar Corp. v. Steinbaum (In re World Solar Corp.), 81 B.R. 603 (Bankr. S.D. Calif. 1988)).

In this case, it appears that the adversary proceeding and the state litigation are in the same procedural posture. The pleadings are closed, and the Defendants in each have filed motions to dismiss. Formal discovery has yet to begin in either case. On the other hand, the Defendant will not consent to the entry of final orders or judgment by the Bankruptcy Court. This means that the Bankruptcy Court would enter proposed finding of fact and conclusions of law to the District Court. The District Court would then enter judgment after a de novo review as to any matters to which a party has objected. See 28 U.S.C. § 157(c). The Defendant has also requested a jury trial in both the adversary proceeding and in its state court pleadings. If the Defendant is entitled to a jury trial, then a motion and order to withdraw the reference to District Court would have to be entered.

Rolan has submitted statistical data from the Administrative Office of the Courts and from the North Carolina Administrative Office of the Courts and it appears from a review of these records that it will take approximately nine months for the matter to be completed in federal court and only eight months for the matter to be completed in state court. It is clear that

the matter can be timely adjudicated in state court. Mecklenburg County is also a "state forum of appropriate jurisdiction." John Griffin and Shannon Griffin agreed in their consulting agreements to submit to the jurisdiction of the Mecklenburg County courts and to waive venue objections.

The burden of proving timely adjudication is on the party seeking abstention. See In re Arid Waterproofing, Inc. 175 B.R. 172, 180 (Bankr. E.D. Pa. 1994). In the matter before the Court, no discovery has been conducted in either forum, the Defendant has demanded a jury trial, the Defendant has not consented to the bankruptcy court entering judgment, all issues to be raised are state court issues, and the bankruptcy case will not be adversely affected by the litigation as the underlying case is a liquidation rather than a reorganization case. The Court can take judicial notice of the statistical information provided with the briefs and determine that the case can be timely adjudicated in state court. The Court is satisfied that the time required for the adjudication of this case in the federal court in this district is no shorter than the average time in Mecklenburg County state court.

Based on the foregoing, the Court finds that Rolan has met its burden of proof and that all six elements of § 1334(c)(2) have been met and that mandatory abstention is required. Therefore an order will be entered contemporaneously with the filing of this Memorandum Opinion granting the motion for mandatory abstention. In as much as mandatory abstention is required, the court will not consider the motion for permissive abstention under 28 U.S.C. § 1334 (c)(1).

This the 27 day of August 2002.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge